Supreme Court, U.S.
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No. 93-1681

In The

Supreme Court of the United States

October Term, 1993

TONY AND JUANITA ROSS,

Petitioners,

v.

FORD MOTOR CREDIT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals Western District

RESPONDENT'S BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Did the Rosses present sufficient evidence at trial to establish a state-enforced judicial custom under 42 U.S.C. § 1983?

2. Is § 105.240 of the Missouri Revised Statutes unconstitutional?

LIST OF PARTIES

The parties to the proceedings in the Missouri Court of Appeals, Western District, were the Petitioners Tony Ross and Juanita Ross and the Respondent Ford Motor Credit Company.

Pursuant to Supreme Court Rule 29.1, Ford Motor Credit Company identifies Ford Motor Company, a Delaware corporation, as its parent company and the following companies as subsidiaries and affiliates that are not wholly owned but have private investors.

SUBSIDIARIES WITH PRIVATE INVESTORS:

Ford Holdings, Inc., a Delaware corporation; Fairland Woods Associates, a partnership; Renaissance Center Partnership, a partnership; and First Nationwide Network, Inc., a Delaware corporation.

AFFILIATES WITH PRIVATE INVESTORS:

Aston Martin Lagonda Group Limited, Newport Pagnell, Bucks, England; Ford Werke AG, Cologne, Germany; Ford Motor Company A/S, Copenhagen, Denmark; Ford Nederland B.B., Amsterdam, The Netherlands; Ford Motor Company (Belgium) N.V., Antwerp, Belgium; Oy Ford Ab, Helsinki, Finland; Ford Motor Company of Canada, Limited, Oakville, Canada; and Ford LIO HO Motor Company LTD., Taipei, Taiwan.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ford Motor Credit Company respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Missouri Court of Appeals, Western District, in this case.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, as modified on its own motion, is reported at 867 S.W.2d 546 (Mo. App. 1993) and is included in the Appendix to the Petition at pp. 1a-26a.

JURISDICTION

On November 30, 1993, the Missouri Court of Appeals, Western District, denied the Rosses' motion for rehearing and/or transfer to the Supreme Court of Missouri (*see* Appendix to Petition at p. 27a). The Supreme Court of Missouri denied the Rosses' application for transfer on January 25, 1994 (*see* Appendix to Petition at p. 28a). Although the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), the Court is without jurisdiction to hear the second question presented in the Petition because it was not properly raised or presented in the Missouri state courts below. United States Supreme Court Rule 14.1(h); *infra* at pp. 7-9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Ford Motor Credit Company accepts the Rosses' statement of the constitutional and statutory provisions at issue, with the exception of Mo. Rev. Stat. § 544.200 (1986) and Missouri Supreme Court Rules 54.12 and 54.13, which have never been at issue in this case.

STATEMENT OF THE CASE

The factual background of this case is correctly set forth in the opinion by the Missouri Court of Appeals. A summary and some historical context follow.

The events at issue occurred more than fourteen years ago. On March 5, 1980, Ford Motor Credit Company

("Ford Credit") undertook to replevin a 1979 Mercury Marquis automobile from Mr. Ross. The replevin action was instituted after an investigation by Ford Credit's assistant branch manager, in which he contacted Mr. Ross, an attorney for Mr. Ross, and the salesman at North Hills Lincoln Mercury, where Mr. Ross had obtained the automobile. Having received conflicting versions of the facts, Ford Credit sought the judicial remedy of replevin pursuant to Rule 99 of the Missouri Supreme Court Rules instead of using self-help. Ford Credit's outside counsel, James Lowe, prepared and signed the replevin petition and affidavit.

On March 10, 1980, the Mercury Marquis automobile was replevined when the Rosses were not at home. That evening, the deputy process server contacted the Rosses and advised them that the car had been replevined. On March 12, 1980, the Rosses were served a copy of the summons and all process, including:

(a) notice of the replevin pursuant to Missouri Supreme Court Rule 99.05;

(b) notice of the Rosses' right to request a hearing pursuant to Rule 99.05; and

(c) notice of the Rosses' right to post a redelivery bond pursuant to Rule 99.05.

Prior to obtaining the order of delivery, Ford Credit had posted a replevin bond in the amount of $14,000, double the fair market value of the automobile, as required by Missouri Supreme Court Rule 99.06. A post-seizure hearing was scheduled for April 10, 1980, but the Rosses opposed such a hearing and instead filed a motion to quash the order of delivery. On April 11, 1980, Ford

Credit voluntarily returned the automobile to the Rosses. On May 29, 1980, Circuit Court Judge Jack E. Gant granted the Rosses' motion to quash. The Rosses then filed state-law counterclaims against Ford Credit for conversion and trespass. In July 1981, Ford Credit's replevin action and the accompanying counterclaims were dismissed without prejudice by the agreement of both parties.

On May 4, 1982, two years after the occurrences at issue here, the Missouri Court of Appeals held in *State ex rel. Tallen v. Marsh*, 633 S.W.2d 458 (Mo. App. 1982), that the form of the affidavit previously used by Ford Credit to obtain orders of delivery in replevin actions was conclusory and did not state facts with the specificity required by Missouri Supreme Court Rule 99.03. The court, however, suggested that the conclusory nature of the affidavit could be cured in future replevin actions by attaching and incorporating by reference the retail installment contract that set forth the terms upon which the financing and the replevinor's right to retake possession of the car were based. 633 S.W.2d at 461.

On November 5, 1982, the Rosses filed this case. After many delays, the case proceeded to trial nearly ten years later on March 16, 1992.

At trial the parties stipulated that in thirty-eight separate replevin actions handled by Mr. Lowe or his law firm between September 4, 1979 and December 9, 1981 a replevin petition, affidavit and a proposed order of delivery similar in form to that used in the replevin action against Mr. Ross were filed on behalf of Ford Credit. There was no evidence regarding the use or acceptance of

such affidavits in the Circuit Court of Jackson County, Missouri by anyone other than Ford Credit. Moreover, there was no evidence:

(a) that any Jackson County Circuit Court Judge knew of the issuance of the other orders of delivery received by Ford Credit;

(b) that Circuit Court Judge Gant relied on such previous orders in issuing the order of delivery involved in this case;

(c) that Ford Credit acted in any way to improperly induce Judge Gant or any other Jackson County Circuit Court Judge to issue an order of delivery; or

(d) that Ford Credit (or any other replevinor) has ever used a conclusory affidavit in a replevin action in the dozen years since the 1982 *Tallen* decision.

Only three of the fifteen counts of the Rosses' petition (complaint) are pertinent here. Two counts alleged that Ford Credit violated 42 U.S.C. § 1983 (Counts III and IV), and Count VII alleged that Ford Credit committed the tort of conversion. The trial court directed verdicts in favor of the Rosses on both § 1983 counts and refused to submit to the jury Ford Credit's good faith defense. On the conversion count, the jury found in favor of the Rosses.

On appeal, Ford Credit argued that the Rosses had failed to make a submissible case on both of the § 1983 counts and that, even if the Rosses had made a submissible § 1983 case, Ford Credit should have been permitted to submit its good faith defense to the jury. *See Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827 (1992). Ford Credit also

argued that there was no evidence to support the submission of punitive damages to the jury on any count. The Court of Appeals agreed with Ford Credit and held that the Rosses had failed to make a submissible case on their § 1983 claims. Appendix to Petition at pp. 5a-6a. The Court of Appeals further held that, although plaintiffs presented a submissible conversion claim, there was no evidence to support an award of punitive damages. Appendix to Petition at p. 19a. The court also held that the Rosses had fully recovered their damages through an out-of-court settlement, and thus the actual damages award of zero against Ford Credit under the conversion count was proper. Appendix to Petition at p. 25a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE INVOLVES A FACTUAL AND HISTORICAL ANOMALY THAT HAS NOT RECURRED SINCE 1982 AND THUS DOES NOT CONCERN A MATTER OF GENERAL OR CONSTITUTIONAL IMPORTANCE WARRANTING REVIEW BY THIS COURT

The questions presented by the Rosses in their Petition for Writ of Certiorari stem from the replevin of a 1979 Mercury by Ford Credit in March 1980 – over fourteen years ago. At trial and on appeal, the Rosses premised their claims on the fact that the replevin affidavit lacked sufficient specificity when viewed in light of the pleading requirements set forth in *State ex rel. Tallen v. Marsh*, 633 S.W.2d 458 (Mo. App. 1982) – a decision handed down more than two years after the replevin

events in this case. Based on evidence that Ford Credit had obtained replevin orders in other cases using the same form of affidavit, the Rosses alleged that the 1980 replevin order involving them resulted from an unconstitutional custom or practice of the Jackson County, Missouri, Circuit Court judges. There was no evidence that the conduct complained of here continued after the *Tallen* decision. Thus, this case has no general significance to the citizens of the United States or of Missouri.

Moreover, the questions presented for review have no impact on the ultimate judgment in this case. The Missouri Court of Appeals determined that the Rosses had fully recovered their actual damages and that Ford Credit's conduct did not warrant the submission of punitive damages to the jury. Appendix to Petition at pp. 24a and 19a. These unchallenged holdings on damages render academic, even to these parties, the liability questions under § 1983.[1]

II. THE ROSSES HAVE EITHER WAIVED OR FAILED TO PROPERLY PRESERVE ANY CHALLENGE TO THE CONSTITUTIONALITY OF MO. REV. STAT. § 105.240 (1986) OR MISSOURI SUPREME COURT RULE 99

The Rosses conceded in the Missouri Court of Appeals that they were not challenging the constitutionality of either Missouri Supreme Court Rule 99 or Mo. Rev. Stat. § 105.240 (1986). The Missouri Court of Appeals

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[1] The actual damages on the two § 1983 counts totalled only $750.

confirmed that the Rosses' appeal did not challenge the constitutionality of either the rule (Appendix to Petition at p. 8a) or the statute (Appendix to Petition at p. 14a). The constitutional challenges were not, and could not have been, presented to or decided by the Missouri Court of Appeals because, under Missouri procedure, the Supreme Court of Missouri has exclusive jurisdiction over challenges to the constitutionality of Missouri statutes. Missouri Constitution Art. V, Sec. 3, *quoted in* Appendix at App. 1. By permitting this appeal to proceed in the Missouri Court of Appeals rather than the Supreme Court of Missouri, the Rosses waived these constitutional challenges. *McLeran v. St. Luke's Hosp. of Kansas City*, 687 S.W.2d 892, 893 (Mo. banc 1985); *State ex rel. Union Elec. Co. v. Public Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985); *accord Parker v. Illinois*, 333 U.S. 571, 573-74 (1948); *Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 193-95 (1925).

Moreover, the only federal question ruled upon by the Missouri Court of Appeals was whether the Rosses had made a submissible case under 42 U.S.C. § 1983. The Missouri Court of Appeals did not rule upon the constitutional challenges to Mo. Rev. Stat. § 105.240 (1986) and Missouri Supreme Court Rule 99 that the Rosses now ask this Court to decide. The petitioners concede as much in their statement of the case wherein they note "it was not necessary to challenge" the constitutionality of Mo. Rev. Stat. § 105.240 (1986) on appeal. Petition at p. 8. Because the lower courts did not rule upon the second question presented by the Rosses in their Petition and because that question was not properly raised or presented before the appellate courts of Missouri, it is not subject to review by

this Court. United States Supreme Court Rule 14.1(h); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940).

III. THE MISSOURI COURT OF APPEALS' DETERMINATION THAT THE ROSSES FAILED TO MAKE A SUBMISSIBLE CASE UNDER 42 U.S.C. § 1983 IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT

The Missouri Court of Appeals correctly determined that the Rosses had failed to make a submissible case under 42 U.S.C. § 1983 on their due process claim (Count III) and their unreasonable search and seizure claim (Count IV). Appendix to Petition at pp. 5a-6a. After an exhaustive review of the trial record, the Missouri Court of Appeals concluded, "We fail to find any 'state enforced custom' in the present case, or any 'custom having the force of law.' " Appendix to Petition at p. 12a. The Missouri Court of Appeals reached this conclusion because all that the evidence established was that certain trial court judges had made errors of law by misinterpreting the requirements of a Missouri Supreme Court Rule. There was no evidence that any of the judges sitting on the Jackson County Circuit Court knew of the issuance of the erroneous orders of delivery by other judges or even those previously issued by themselves. Thus, the Court of Appeals held that there was no evidence that a state policy was the cause of the alleged deprivation. Appendix to Petition at p. 10a. Misinterpretation of a rule or statute by trial judges in separate and independent cases does not constitute a policy or custom when there is no

evidence that the judges actually knew of and acted pursuant to a policy or custom.[2]

Contrary to the Rosses' assertion (Petition at pp. 13-18), this holding is consistent with *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and *Dennis v. Sparks*, 449 U.S. 24 (1980).[3] In *Adickes*, judgment was entered for the defendant by the trial court on motion for summary judgment. The case was remanded because no opportunity had been provided to present evidence on the issue of whether "the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service" as part of a "state enforced" custom of segregation. 398 U.S.

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[2] In any event, even though the replevin order may have been void under *Tallen*, the Rosses were provided constitutional due process. Pursuant to Rule 99's mandate, Ford Credit posted a delivery bond in an amount double the fair market value of the automobile and the Rosses were given notice of their right to a post-seizure hearing and to post a redelivery bond. Additionally, Missouri law provided for, and the Rosses asserted, post-replevin causes of action for the deprivation alleged (*i.e.*, their counterclaims for conversion and trespass). These post-deprivation procedures and remedies provided the Rosses with adequate procedural due process of law. *See Zinermon v. Burch*, 494 U.S. 113 (1990) (state-law remedies for erroneous deprivations satisfy due process standards); *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (overruled in part, not relevant here, by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)).

[3] The third case principally relied on by the Rosses, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), is readily distinguished. In that case, the constitutionality of Virginia's prejudgment attachment statute was challenged. By contrast, in this case an alleged custom, separate and apart from a constitutional statute, was at issue.

at 158. Moreover, in *Adickes* there was evidence that Kress' refusal to serve the plaintiff was motivated in part by Mississippi's previously enforced custom of racial segregation. *Id.* at 173. In *Dennis*, there was evidence that a state court judge had been bribed and thus had unlawfully "conspired" with private litigants to deprive the plaintiffs of constitutionally protected rights. 449 U.S. at 29.

In this case, by contrast, there was no evidence of any conspiracy nor evidence that any judge was motivated by or acted in a manner that was caused by a policy or custom of the State of Missouri. This case, unlike *Adickes* and *Dennis*, involved nothing more than a private litigant who, in a series of separate replevin actions, obtained orders of delivery based on a form of affidavit later determined to be insufficient under state law.[4] As stated by the Court in *Dennis*, "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." 449 U.S. at 28.

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[4] Petitioners' recourse for the improper replevin was a cause of action for conversion, which they pursued.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF MISSOURI

Article V, Section 3.

Section 3. Jurisdiction of the supreme court. The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.